

Before the
Federal Communications Commission
Washington, D.C. 20554

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MAR 15 2005

In the Matter of)
)
Unbundled Access to Network Elements) WC Docket No. 04-313
)
Review of the Section 251 Unbundling) CC Docket No. 01-338
Obligations of Incumbent Local Exchange)
Carriers)

ORDER

Adopted: March 14, 2005

Released: March 14, 2005

By the Chief, Wireline Competition Bureau:

1. In this Order, we deny the Petition for Stay Pending Judicial Review filed by Verizon in these dockets.¹ Verizon seeks a partial stay of the Commission's *Triennial Review Remand Order*,² which addressed the unbundling obligations of incumbent local exchange carriers (LECs) pursuant to section 251(c)(3) of the Telecommunications Act of 1996.³ That Order was released on February 4, 2005, and became effective on March 11, 2005. Specifically, Verizon seeks a stay of the Commission's determination to maintain its policy allowing competitive LECs to "convert" tariffed incumbent LEC "special access" arrangements to unbundled network element (UNE) arrangements, subject to any applicable charges, where the competitive LEC would (absent the requested stay) be eligible to order the UNE(s) at issue.⁴

2. To obtain a stay, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.⁵ These stringent criteria have not been met here. Among other defects, Verizon has failed to demonstrate that it is likely to prevail on the merits, because the rules at issue are consistent with the Act and with guidance received by

¹ Verizon, Petition for Stay Pending Judicial Review, CC Docket No. 01-338, WC Docket No. 04-313 (filed Feb. 25, 2005) (Petition).

² *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand (rel. Feb. 4, 2005) (*Triennial Review Remand Order*), petitions for review filed.

³ 47 U.S.C. § 251(c)(3).

⁴ See Petition at 1-2. See generally *Triennial Review Remand Order* at paras. 229-232; see also *id.* at paras. 64-65.

⁵ See, e.g., *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

the courts, as explained fully in the *Triennial Review Remand Order*.⁶ Moreover, the balance of equities counsels against a stay. Verizon has not demonstrated that it will suffer substantial harm in the absence of a stay that would outweigh the harm other parties and the public would likely suffer if its petition were granted. As described below, the rules at issue maintain the Commission's preexisting policy allowing conversions.⁷ Denial of the stay would therefore result in no change in the *status quo*, whereas the relief Verizon seeks would foreclose UNE access where such access remains a necessary precondition to competition in the local exchange market. Accordingly, we deny Verizon's petition.

3. We note, in addition, that Verizon's petition is procedurally defective, because it seeks not the maintenance of the *status quo* pending judicial review, but rather the adoption of a new, never-before-enacted prohibition on competitive LECs' access to UNEs.⁸ The *Triennial Review Remand Order* did not reverse a previous policy barring conversions where competitive LECs were otherwise eligible for the UNE at issue. In fact, the Commission has never adopted such a bar. The *Triennial Review Remand Order* instead merely reaffirmed the Commission's preexisting policy allowing conversion of services obtained under tariff to UNE arrangements. That policy was reviewed by the U.S. Court of Appeals for the District of Columbia Circuit, which left the Commission's conversions rules undisturbed.⁹ The "stay" Verizon seeks thus would effect – not prevent – a change in the *status quo*. This result would be inconsistent with the purposes of a stay pending judicial review.

4. Accordingly, IT IS ORDERED pursuant to the authority of sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154 (i), 154(j), and sections 1.43 and 1.44 of the Commission's Rules, 47 C.F.R. §§ 1.43, 1.44, that the Petition for Stay Pending Judicial Review submitted by Verizon in the above-captioned proceeding on February 25, 2005, IS DENIED.

⁶ See *Triennial Review Remand Order* at paras. 229-232; see also *id.* at paras. 64-65.

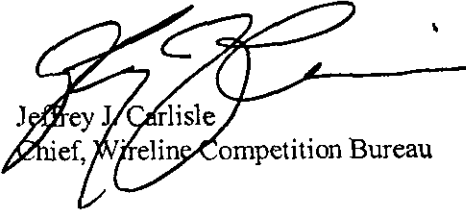
⁷ See 47 C.F.R. § 51.316 (2003).

⁸ See, e.g., XO, Opposition to Verizon Petition for Stay, CC Docket No. 01-338, WC Docket No. 04-313 at 3-4 (filed March 3, 2005).

⁹ *United States Telecom Association v. FCC*, 359 F.3d 554, 593 (D.C. Cir. 2004). The court directed the Commission to review its conversion policy in light of its directive that "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates . . . precludes a finding that the CLECs are 'impaired' by lack of access to the element under § 251(c)(3)." *Id.* The Commission did so, precluding *all* UNE access – and therefore *all* conversions – for provision of service to the long-distance and mobile wireless markets, where competitors had succeeded without access to UNEs. *Triennial Review Remand Order* paras. 29-40. Thus, while the Commission continued to permit conversions, as a practical matter such conversions will only be possible for carriers that will use those UNEs to serve the less-competitive telephone exchange and exchange access markets. *Id.* paras. 38-39; see also *id.* para. 230 (explaining that the effect of this rule is to prohibit conversion of the vast majority of existing special access arrangements).

5. This action is taken under delegated authority pursuant to sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291.

FEDERAL COMMUNICATIONS COMMISSION



Jeffrey I. Carlisle
Chief, Wireline Competition Bureau